Appln No.: 10/634,345
Filing Date: 08/05/2003
Attorney Docket No. 281132

Applicant(s): GOURLAY, *et al.*
Examiner: Jeffrey R. Swearingen
Group Art Unit: 2445

Remarks

This communication is responsive to the Final Office Action of **November 13, 2008**. Reexamination and reconsideration of the claims is respectfully requested.

Summary of The Office Action

Claims 1, 3-13 and 28-33 were rejected under 35 USC 102(e) as being anticipated by O'Toole, Jr. (US 7,024,548) (O'Toole).

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The Claims Patentably Distinguish Over the References of Record

35 U.S.C. §102

For a 35 U.S.C. §102 reference to anticipate a claim, the reference must teach each and every element of the claim. Section 2131 of the MPEP recites:

> A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Here, the reference does not anticipate the claim because the reference fails to set forth "detecting that the remote device uses a particular protocol in which to communicate through the given communication port with a network resource" as claimed and described.

The Office Action states:

> *detecting that the remote device uses a particular protocol in which to communicate through the given communication port with a network resource*; column 12, lines 20-52 detects the remote device is communicating. The device is **inherently communicating with a particular protocol**. (emphasis added) (OA page 2, last paragraph)

While the Office Action is correct in stating that "[t]he device is inherently communicating with a particular protocol" this is not what the claim limitation requires. The claim explicitly states, "detecting that the remote device uses a particular protocol." One of ordinary skill in the art would recognize that there is an active step recited by the claim of **detecting the particular protocol** used not detecting the presence or absence of a signal as purported by the Office Action. MPEP 2111 requires:

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During patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification." >The Federal Circuit's *en banc* decision in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) expressly recognized that the USPTO employs the "broadest reasonable interpretation" standard:

The Patent and Trademark Office ("PTO") determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction "in light of the specification as it would be interpreted by one of ordinary skill in the art." *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364[, 70 USPQ2d 1827] (Fed. Cir. 2004). Indeed, the rules of the PTO require that application claims must "conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description." 37 CFR 1.75(d)(1).

Here, the interpretation given to the claim by the Office Action is not reasonable because the interpretation ignores the meaning of detecting and its relation to the particular protocol. Giving "detecting a particular protocol" its broadest reasonable interpretation consistent with the specification requires a specific step of determining which protocol is used. Nothing in O'Toole teaches detecting a particular protocol. O'Toole teaches a conditional response to the loss of a heartbeat signal. (O'Toole Col. 12, lines 28-33). While O'Toole does communicate using a protocol, O'Toole's use of a protocol is predetermined and not detected. The only detecting taught by O'Toole is the detection of a conditional operation by the network device. (O'Toole Col. 12, lines 48-51). Thus, O'Toole teaches the detection of the presence/absence of a signal and not the detection of a particular protocol.

For purposes of illustration the cited portion of O'Toole is reproduced below in table form. This table clearly demonstrates that O'Toole fails to teach or even suggest detecting a particular protocol.

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Column 12, lines 20-52	Teaches "detecting that the remote device uses a particular protocol?"
In this example embodiment, the conditional operation 177 causes a shutdown or other idle state condition within the computerized device 110 that causes the communications link 107 between computerized device 110 and the monitoring device 130 to be broken for a certain amount of time as illustrated in FIG. 1.	No
As a result of this conditional operation 177 (i.e., a shutdown in this example) the change monitor process 140 operating within the monitoring device 130 detects the conditional operation 177 of the computerized device 110.	No
This may be done, for example, when the change monitor 140 detects a loss of a heartbeat or other communications signal periodically sent (e.g., every 20 seconds) as shown by communications 192,194 between the computerized device 110 and the monitoring device 130.	No
The conditional operation 177 may occur for a period of time (e.g., greater than 20 seconds) that is sufficient for the monitoring device 130 to perceive the computerized device 110 may have undergone an unauthorized change to its existing configuration 118 (e.g., because there is a loss of communications).	No
In other words, in the example in FIG. 1, the monitoring device may poll 192 the computerized device 110 at certain predetermined time intervals.	No
The computerized device 110 can respond to each poll 192 with a response 194 indicating that the computerized device 110 is operating properly.	No
Alternatively, the device 110 may periodically send a heartbeat 194 every N seconds which the change monitor 140 will detect.	No
During a conditional operation however, the device 110 with not engage in the polling protocol 192, 194 (or send a heartbeat signal, etc.) and thus the monitoring device 130	No

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is capable (assuming it is operating properly) of detecting the conditional operation.	
Note that there may be more than one monitoring device 130 operating in the system 100 for redundancy and/or load sharing purposes.	No

O'Toole fails to anticipate the claims, since each and every element is not taught as required for a prima facie 102(e) rejection. Therefore, the claims are in condition for allowance. Additionally, newly added claims 34 and 35 recite essentially the same allowable limitations as claim 1 and are therefore allowable. No new matter is added with the addition of claims 34 and 35.

References Cited But Not Applied

The references cited but not applied have been considered and do not teach or suggest the recited features of the respective claims, individually or in combination with each other. Therefore, all claims are in condition for allowance.
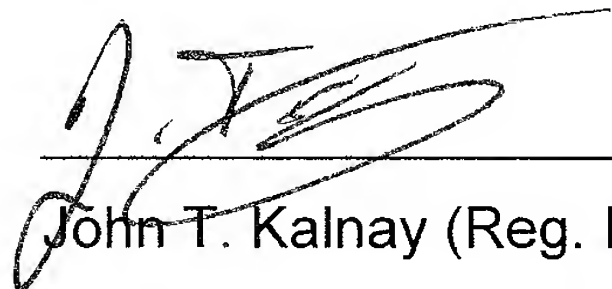
Conclusion

For the reasons set forth above, the claims are now in condition for allowance. An early allowance of the claims is earnestly solicited.

Respectfully submitted,

Date: January 7, 2009

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